UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CARLTON C. JOHNSON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 02-04-P-C***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges inability to work as a result of chronic back and neck pain, pulmonary, cardiac and emotional problems and gastritis, does not have conditions meeting or equaling a so-called "listing." I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920, *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the medical evidence established that the plaintiff

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on August 8, 2002, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

had mild degenerative arthritis of the low back, complaints of left shoulder pain, mild to moderate chronic obstructive pulmonary disease ("COPD"), atypical chest pain, mild to moderate depression and a history of alcohol abuse, Finding 3, Record at 22; that he had experienced a myocardial infarction in October 1998, but any resulting cardiac impairment was not shown to have lasted or to be expected to last for a continuous period of twelve months, *id*.; that he did not have an impairment or combination of impairments meeting or equaling any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), *id*.; that his impairments did not prevent him from performing his past light work as a sales person or from performing a wide range of other light and sedentary jobs, Finding 5, *id*.; and that he was not under a disability at any time through the date of the decision (July 23, 1999), Finding 6, *id*. at 22-23. The Appeals Council declined to review the decision, *id*. at 7-8, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 4 of the sequential process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step the commissioner must make findings of the plaintiff's residual functional capacity and the physical and mental demands of past work and determine whether the plaintiff's residual functional capacity would

permit performance of that work. 20 C.F.R. §§ 404.1520(e), 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service* Rulings 1975-1982 ("SSR 82-62"), at 813.

In addition, the plaintiff's statement of errors implicates two other steps in the decisional path: Steps 3 and 5. At Step 3, a claimant bears the burden of proving that his or her impairment or combination of impairments meets or equals the Listings. 20 C.F.R. §§ 404.1520(d), 416.920(d); *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). To meet a listed impairment, the claimant's medical findings (*i.e.*, symptoms, signs and laboratory findings) must match those described in the Listing for that impairment. 20 C.F.R. §§ 404.1525(d), 404.1528, 416.925(d), 416.928. To equal a Listing, the claimant's medical findings must be "at least equal in severity and duration to the listed findings." 20 C.F.R. §§ 404.1526(a), 416.926(a). Determinations of equivalence must be based on medical evidence only and must be supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §§ 404.1526(b), 416.926(b).

At Step 5, the burden of proof shifts to the commissioner to show that a claimant can perform work other than his or her past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Yuckert*, 482 U.S. at 146 n.5; *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff frames the issues presented as (i) whether he meets or equals the Listings and (ii) whether he has any transferable skills. Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 3) at 1. Specifically, he argues that he meets the Listings for depression and heart disease or that the combination of those impairments and his COPD equals the Listings. *Id*. at 2.[2] I discern no error as to either point.

[2] Counsel for the plaintiff confirmed at oral argument that he presses no claim regarding the administrative law judge's Step 4 finding.

I. Discussion

As an initial matter, the plaintiff argues that he meets Listing 12.04(A) for depression in view of the report of examining consultant Lydia S. Ward-Chene, Psy.D., that he suffered from appetite and sleep disturbances, thoughts of suicide (two attempts) and paranoid thinking. *Id*. at 2; *see also* Record at 209-14. This argument founders primarily because the plaintiff overlooks the fact that a claimant must meet the requirements of both parts A and B of Listing 12.04 – not just part A – to demonstrate the required level of severity. *See* Listing 12.04.

The plaintiff makes no argument that he meets part B, which entails a showing that a claimant's affective disorder results in at least two of the following:

1. Marked restriction of activities of daily living; or
2. Marked difficulties in maintaining social functioning; or
3. Marked difficulties in maintaining concentration, persistence, or pace; or
4. Repeated episodes of decompensation, each of extended duration[.]

Listing 12.04(B). In any event, the record contains only one evaluation of the impact of the plaintiff's affective disorder on the part B factors. That assessment falls well short of supporting a finding that part B is met. After reviewing Dr. Ward-Chene's report, non-examining consultant Peter G. Allen, Ph.D., completed a psychiatric review technique form ("PRTF") in which he concluded that the plaintiff's mental impairment was non-severe, imposing only slight restrictions on activities of daily living and social functioning and seldom causing difficulties in maintaining concentration, persistence or pace. Record at 124-25, 132.[3]

[3] While Dr. Ward-Chene did not expressly discuss the part B criteria, her report fairly can be read as concluding that the plaintiff's mental condition significantly impaired his functioning, at least in terms of social interaction. *See, e.g.*, Record at 213 (stating that the plaintiff likely "would have great difficulty functioning in an employment setting at this time because of his physical problems precluding many forms of physical work as well as his emotional problems precluding him from working successfully in an environment with other people."). Dr. Allen implicitly disagreed, explaining, *inter alia*, that in his view the plaintiff's "[m]ain problems appear to be lifestyle issues (smoking, drinking) [with] no past mental health involvement. Some stress related to conflicts [with] 14-y.o. son. Mental impairment appears to be nonsevere as he only developed these issues" at the time of his visit to Dr. Ward-Chene. *Id*. at 125. Such conflicts in the evidence are the province of the administrative law judge to resolve. *See, e.g.*, *Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the (continued…)

The plaintiff next argues that he should have been found to have met an unspecified Listing for cardiovascular impairment. Statement of Errors at 2. He takes issue with the finding of the administrative law judge that:

> It is noted that the claimant experienced a severe heart attack in October 1998, and subsequent medical evidence substantiates continuing complaints of chest pain and coronary artery disease. However, it is not shown that this condition has lasted or is expected to last for a continuous period of twelve months and therefore the claimant cannot be found to be disabled at this time.

Id. at 1 (quoting Record at 22 (emphasis in original)). Specifically, he complains that the administrative law judge referred to only one of three then-known hospitalizations, omitting mention of cardiac hospitalizations in November and December 1998. *Id*. at 1, 2. The plaintiff errs. In fact, the administrative law judge clearly referred to the November and December 1998 hospitalizations when she observed that medical evidence "subsequent" to the October 1998 heart attack substantiated "continuing complaints of chest pain and coronary artery disease."

That the administrative law judge was well aware of the November and December hospitalizations is clear both from the body of her decision and from the transcript of the plaintiff's December 16, 1998 hearing. *See, e.g*, Record at 19, 353-56. She discussed at some length with both the plaintiff's counsel and medical expert Peter B. Webber, M.D.,[4] the need to obtain records of those hospitalizations to shed light on the question whether the plaintiff's heart condition met or equaled a Listing. *See, e.g*., Record at 353-56. She held the record open to receive these documents and obtain additional testimony from Dr. Webber, commenting, "I'm open to interrogatories, or anything else, if necessary, if Dr. Web[b]er is." *Id*. at 355. Inasmuch as appears, the plaintiff supplied the missing records, *see id*. at 4, 219-325, but sought no supplemental hearing and propounded no post-hearing

determination of the ultimate question of disability is for him, not for the doctors or for the courts.").

[4] Dr. Webber's name incorrectly is transcribed as "Weber." *See* Record at 52 (curriculum vitae).

interrogatories to Dr. Webber, *see, e.g., id*. at 354 (representation of plaintiff's counsel that no additional hearing would be necessary).[5]

Moreover, it is doubtful that, if asked, Dr. Webber would have concluded that the additional documents supported a finding that the plaintiff's heart condition met or equaled a Listing. *See, e.g.*, Record at 220 (letter dated December 8, 1998 from George N. Welch, M.D., to Daniel L. Mattox, M.D., noting, "I will see [the plaintiff] again in follow-up at Maine Cardiology Associates on December 15th, after which time I do not think he will need follow-up unless he has some new cardiovascular event or problem."), 229 (cardiac catheterization report dated November 18, 1998 by Dr. Welch finding "[i]nsignificant coronary artery disease").

The plaintiff next contends that by virtue of the combination of his depression, heart condition and COPD he should have been found to have equaled the Listings. Statement of Errors at 1-2. This contention, too, fails. As to the plaintiff's COPD, Dr. Webber testified, "He does have a couple of pulmonary function studies in the chart and they do not come close to the Listings. This doesn't mean to say that on physical activity he isn't short of breath, but still, it can't still [sic] be used as an equal [sic] or meeting a Listing." Record at 355. On the question whether the totality of the plaintiff's medical problems equaled a Listing, Dr. Webber stated, "Whether we can eventually say that anything really truly meets a listing, or even equals a listing, I don't know, but I think the summation of his medical problems certainly put him in a, I would guess, probably almost a sedentary type of existence." *Id*. at 360.

[5] The plaintiff's counsel did inform the administrative law judge that he needed an "answer from the doctor" regarding the import of the new evidence. Record at 354. The administrative law judge responded, "What I'll do is, after I hear Dr. Web[b]er's testimony, . . . I'll determine whether we need" the interrogatories. *Id*. Neither the administrative law judge nor the plaintiff's counsel raised the issue of the interrogatories again prior to the end of the hearing. However, it behooved the plaintiff's counsel, if he perceived the issue as having been dropped, to have raised it with the administrative law judge either during or after the hearing.

The bottom line is that the Record in this case contains no positive, unequivocal evidence that the plaintiff had conditions meeting or equaling a Listing. At Step 3, it was the plaintiff's burden to adduce such evidence. The administrative law judge accordingly did not err in concluding that, through the date of decision, no Listing was shown to have been met or equaled.

I briefly address the plaintiff's additional contention that there is an issue whether or not he had any transferable skills. Statement of Errors at 1. The plaintiff fails to develop this point, *see generally id*., and accordingly it is difficult to understand the nature of this claim. However, he apparently alludes to a concept germane to a Step 5 analysis – whether a claimant without transferable skills qualifies as disabled pursuant to the so-called "Grid," Appendix 2 to Subpart P, 20 C.F.R. § 404. Inasmuch as the administrative law judge found it unnecessary to reach Step 5, any Step 5-based challenge is irrelevant.[6]

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 9th day of August, 2002.

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[6] The administrative law judge muddied the waters by making a finding relevant to a Step 5 analysis – that the claimant's impairments did not prevent him from performing "a wide range of other light and sedentary jobs." Finding 5, Record at 22. However, her decision can only sensibly be read as stopping at Step 4. Under the circumstances, it was unnecessary for her to reach Step 5; in addition, she did not purport to make a full Step 5 analysis, omitting any discussion whether, pursuant to the Grid or vocational evidence, the plaintiff was capable of performing work existing in significant numbers in the national economy.

David M. Cohen
United States Magistrate Judge

ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 02-CV-4

JOHNSON v. SOCIAL SECURITY, COM Filed: 01/07/02
Assigned to: JUDGE GENE CARTER
Referred to: MAG. JUDGE DAVID M. COHEN
Demand: $0,000 Nature of Suit: 863
Lead Docket: None Jurisdiction: US Defendant
Dkt# in other court: None

Cause: 42:405 Review of HHS Decision (DIWC)

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